

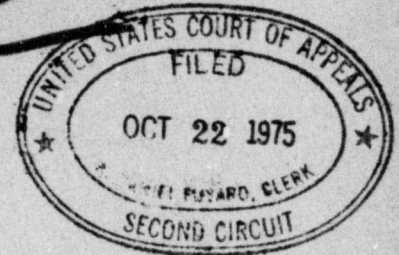
***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6092

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



Docket No. 75-6092

WILLIAM L. EVERS, Executor of the Estate of
WILLIAM DANA MILLER,

Plaintiff-Appellant,

v.

CASPAR WEINBERGER, Secretary of Health,
Education and Welfare,

Defendant-Appellee.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

Question Presented

Whether or not the administrative record of the Social Security Administration contains substantial evidence warranting a determination that the claimant of social security retirement benefits, whose auditory ability was admittedly impaired so as to limit his capacity for work, performed services over and above those for which he was compensated the maximum monthly amounts permitted by law without

reducing his right to retirement benefits under the Social Security Act.

Statement

In this action for review of a determination of defendant-Secretary of Health, Education and Welfare that plaintiff's decedent, William Dana Miller, was not entitled to receive such retirement benefits, summary judgment affirming the denial thereof has been awarded in favor of defendant by Hon. Jacob Mishler, Ch. J., his supporting opinion not yet being officially reported.

Miller's right to a portion of the retirement benefits sought was originally upheld in a lengthy, well-considered opinion following hearings before, Administrative Law Judge, Ashley, J. (20-36)* which, however, was subsequently reversed sua sponte by the Appeals Council of the Social Security Administration on the basis of the record of the previous administrative proceedings. Miller then commenced the instant action for review. Issue was joined by the service of defendant's answer which, in essence, was a general denial of Miller's claim to benefits coupled with a defense to the effect that the decision of the Secretary, which adopted the determination of the Appeals Council, was supported by substantial evidence in the administrative

*Unless otherwise indicated, numerals in parentheses refer to corresponding portions of the accompanying administrative record and opinion of the District Court.

record.

Thereafter, Miller died, his executor, William L. Evers (who is also Miller's stepson) was substituted as party plaintiff in his place* and both plaintiff and defendant moved for summary judgment. The District Court rendered an order denying plaintiff's motion but granting defendant's motion and thereafter the judgment appealed from was entered. Notice of appeal was filed on September 5, 1975.

The Evidence in Support of Miller's Claim

The administrative record shows that plaintiff's decedent, William Dana Miller, was born on January 5, 1900. He studied geology at the University of Chicago and in 1919 graduated with a degree of Bachelor of Science (17). Thereafter, he went on to a career marked by great physical activity. He became an exploratory petroleum geologist for various companies (17, 69-70) and in that capacity conducted extensive explorations in widely separated parts of the world, including the jungles of Venezuela and Colombia, as well as in New Zealand, Australia, Russia and other countries. Among other things, he and another were

*It is to be noted that a "so ordered" stipulation of such substitution was filed in the District Court on June 6, 1975, which was after the motions for summary judgment were served.

the first white men to discover Angel's Falls, the highest falls in the world, which is located in Venezuela. In the course of his explorations, he also discovered in the Colombian jungles a secret submarine base which had been established by the Germans in preparation for World War II but which he reported to the United States Navy, with the result that it was attacked and bombed out of existence by the Americans shortly after the war began. (11).

Early in the 1920s, he contracted malaria and thereafter consumed prodigious quantities of quinine to remedy its recurrence (721-72, 97) and to permit his continued activity as a geologist. By 1957, he had become Vice President and General Manager of Esperanza Oil Corporation, which was a subsidiary of Amerada Petroleum Corporation, from which position he retired in that year (73-74).

Prior to such retirement and in 1950, however, his inclination towards energetic activity was reflected in his participation in founding and nurturing Manhattan Direct Mail, Inc., a New York corporation engaged in the business of printing, delivering and mailing letters, catalogs, brochures and the like to persons listed on customer lists supplied by MDM's customers (77). MDM then was a small business and

never grew much larger. By the time the present action was commenced, it occupied a small loft, approximately 25' by 60' in area, in downtown Manhattan and employed about ten people. When Miller began his activities with MDM in 1950 he furnished the cash needed to meet weekly payrolls and for the purchase of equipment. He also worked with MDM irregularly on a part time basis, doing everything from operating machinery to managing the company, as is typical of operators of small businesses, and became an officer, director and stockholder thereof. (76, 118). On January 22, 1952, he became president and treasurer of MDM. Marie Evers, who he married in that year, became its vice president. Her son, the plaintiff herein, William L. Evers, became its secretary (82). All were directors and stockholders, and ultimately became the only officers, directors and stockholders of MDM.

From 1950 to 1957, Miller's part time work at MDM consisted of the above mentioned varied activities comprising, among other things, his operation of various machines, including a so-called "folding machine", "riding herd on the books", purchasing machinery, passing on the hiring and discharge of its employees, and making cost analyses and time studies (82-84). In connection with the aforementioned books of MDM,

it should be noted that they were kept on an informal basis and could not have been very extensive in view of the extremely limited scale of MDM's operations. As Miller had done at the outset, he continued to finance its weekly payroll when needed (87) and to provide funds for purchasing machinery(133).

After retiring from Esperanza Oil Corporation in 1957, he increased his activity at MDM, where he worked for 8 or 9 hours a day, seven days a week (170). As testified to by his wife, Marie Evers Miller, his stepson, the plaintiff, William L. Evers, and himself, his work consisted of operating a folding machine, making irregularly scheduled deliveries by truck, keeping time and production schedules and estimating job times (88, 119, 137, 169-172). He also rendered advice respecting salaries and employment, company policy, the purchase of additional equipment and selecting plant space when needed (119-120). He, as well as other officers of MDM, was authorized to sign checks. In short, after 1957 he continued to perform the diverse tasks typically performed by owner-managers of small businesses but increased the amount of time spent for such purposes and the diversity of the work which he performed at MDM. In the course of such work, it was frequently necessary for him to converse with others by telephone and face to face (72, 120, 171-172); and

in operating the folding machine in a safe manner, it was necessary that he be able to hear it so as to detect and promptly remedy clogging thereof and avoid the risk of injury (90-91).

It has been previously indicated that by reason of the malaria which he contracted in his youth, he consumed large quantities of quinine over an extended period of time. In the course of the administrative proceedings below, medical authorities were adduced describing a condition known as "cinchonism", which is caused by hypersensitivity to quinine or by excessive or prolonged use thereof, and which is characterized by deafness (97-99).

By May 1966, Miller's use of quinine had resulted in a severe loss of hearing in both ears so that he could not carry on conversations by telephone or face to face (89-90, 138, 139) and could not operate the folding machine without risking serious physical injury, as indeed had been incurred by him on several prior occasions during such operation (138, 199). The risk of such injury was corroborated by the testimony of the plant foreman, Harry Hughes, indicating the danger of such operation by a person having an impairment of hearing to the degree suffered by Miller (158-162).

As indicative of the nature and extent of Miller's disability, the evidence adduced in the administrative proceedings showed that during the period commencing November 27, 1965 and thereafter, Miller purchased numerous hearing aids but that they proved to be unsatisfactory (91-96). There was also received in evidence a medical report by Dr. Lawrence A. Mazarella, who had considered Miller's medical history and conducted a comprehensive audiological and medical examination of Miller. The report, originally marked in evidence as Exhibit 47 (124) and later marked as Exhibit 66 (213), set forth, at pp. 447-448 of the administrative record, the following significant data regarding Miller's disability:

"* * * Mr. Miller's hearing loss is calculated as an 80% hearing loss in the right ear and a 100% hearing loss in the left ear. There is an 83% binaural hearing loss.

"A review of Mr. Miller's records from hearing aid purchases shows that this degree of hearing loss has definitely been present from at least 1968, as document[ed] by an audiogram done at Beltone Hearing Aid of Staten Island. In all probability it has been present from 1965 when the first hearing aid was purchased.

"It is my opinion that Mr. Miller has a severe handicap due to his hearing loss. The prolonged use of Quinine over so many years significantly contributed to this hearing loss. He can understand only shouted or amplified speech. His use of the telephone is severely restricted. There are limitations to the amount of hearing aid amplification that can be used because of poor tolerance of amplified sound."

Concurrently with the impairment of Miller's auditory ability and the consequent limitation of his ability to perform his work at MDM, his stepson, the plaintiff, William L. Evers, experienced matrimonial difficulties resulting in the award to him of custody of his children (438-446), Evers' wife having become mentally ill and later being confined to a mental institution. A divorce also ensued (172-176). During the custody battle which was a part of that litigation, Evers received numerous threats upon his life which were to be carried out if he did not yield the custody of the children to his wife (177-179). Threats that the children would be abducted were also made (180). Resisting these pressures, however, he moved to a new apartment in Brooklyn and later to Staten Island, and in view of Miller's hearing loss whereby his ability to work effectively was impaired, it was decided that it would be best if he remained at home with the children so that his presence would insure their security while Evers and Mrs. Miller were at work in MDM (180-182, 195-196).

Accordingly, at the beginning of June 1966 Miller retired and continued to occupy that status through December 1971, during which time he supervised the children (102). As might have been expected in the case of

this intensely energetic man who, throughout his life, had been accustomed to a great degree of physical and mental activity, Miller did not take readily to the abrupt reduction in activity brought about by his retirement from MDM at the end of May 1966. From time to time thereafter, he visited MDM's plant where he attempted to perform a miscellany of tasks of a limited nature consistent with his impaired ability to hear and was paid the sum of \$125 per month during the period commencing with June 1966 and continuing through 1967, and the further sum of \$140 per month for the period thereafter and through December 1971 (107-108), which were the maximum sums allowable under the Social Security Act without entailing a reduction in his right to retirement benefits thereunder.

Prior to June 1, 1966, MDM paid Miller \$600 per month. In December 1968, MDM gave him a so-called "bonus" of \$10,000. In December of 1969, 1970 and 1971, MDM gave him a so-called "bonus" of \$5,000 in each of such years. In regard to these "bonuses", it was testified on his behalf that they were paid in recognition of his earlier contribution of working capital to MDM during the years 1950 to 1957 when it was in its infancy and financing was not otherwise available, or that such sums also represented payments to him of undistributed profits of MDM but that they did not represent earnings or com-

pensation for services rendered by him to MDM during the foregoing period of his retirement (108-112, 131, 190-194). Although during that period he continued nominally as president and director of MDM (and may for social security purposes be deemed to have been self-employed in that sense, Weisenfeld v. Richardson, C.A.N.J. 1972, 463 F.2d 670) the record is devoid of evidence that he performed any services while he was thus retired above and beyond those for which he received the said sums of \$125 and \$140 per month or that the said "bonuses" were, in fact, compensation or earnings for such additional services or, indeed, for any services whatsoever during such period (108-109, 140, 142, 224).

In June 1966, he was awarded social security retirement benefits. From 1968 to 1972 his right to benefits was repeatedly investigated by the Social Security Administration. On March 15, 1972, benefits were stopped, pending determination of when he had retired (225). On March 30, 1972, MDM specifically advised the Social Security Administration that he was "in ill health and has totally lost his hearing. He rarely comes into Manhattan since we live on Staten Island" (226) but despite this specific information as to the existence of his disability, no investigation of this matter was conducted by the Social Security Administration.

Subsequently on July 10, 1972, the Social Security Administration advised him that he had failed to prove that he had retired and that the benefits previously paid to him were an overpayment which should be refunded or offset against future benefits. (54-55).

Following rehearing of the matter, the Administrative Law Judge, Ashley, J., held that Miller had been employed by MDM from January 1965 through December 1971 but that after 1967, by reason of his hearing loss and the need for his presence at his stepson's home, "he did no work for this company during the inclusive months of January 1968 through December 1971, even though the employer-employee relationship was maintained" and therefore that he was eligible for benefits during that period (36).

On its own motion, the Appeals Council of the Social Security Administration modified the determination of the Administrative Law Judge so as to deny plaintiff all retirement benefits.

The Evidence Relied Upon As The Basis
For Denying Retirement Benefits To Miller

Although the medical report quoted at page 8, supra, indicated that Miller's deafness "has definitely been present from at least 1968 * * * [and] In all probability it has been present from 1965 when the first hearing aid was purchased", the Administrative Law Judge held that Miller had established his right to retirement benefits

only from January 1, 1968 through December 1971.

Thereafter, in reversing this determination so as to deny all benefits to Miller, the Appeals Council noted that he had applied for medical and retirement benefits on March 31st and June 1st, 1966 but that thereafter, despite his retirement he remained the president of MDM and a stockholder thereof together with his wife and stepson (11). In the corporate tax returns for the years in question, it was indicated that he devoted "full" time to MDM's business (11, 347, 353, and Record, 264, 269, 274, 278).

Although the Administrative Law judge found that Miller's hearing loss prevented him from working beginning January 1968 and such conclusion was reached after a consideration of the foregoing medical report and the statement therein that "There are limitations to the amount of hearing aid amplification that can be used because of poor tolerance to amplified sound", and the Administrative Law Judge also had an opportunity to observe Miller during his testimony, the Appeals Council, which had before it only the transcript of that testimony, disagreed, observing that "The claimant's hearing loss did not prevent him from testifying at his hearing." (12) The Appeals Council went on to find with respect to Miller's auditory disability, "Perhaps it does hamper

his operation of printing equipment and his use of the telephone, but it would have no effect on his ability to do paperwork and to give advice and consultation, which have been his main functions in the Corporation." (12).

It was also noted that Miller had been paid "bonuses" to compensate him for money he had invested in MDM in prior years but that the yearly "wages" reported for him during the years of this retirement included such "bonuses" as well as the aforementioned maximum allowable statutory amounts (12) - the Appeals Council subsequently holding that the "bonuses" represented deferred payments of wages for the preceding months of the years in which such "bonuses" were received (13).

Although Miller, his wife and stepson testified that he had seldom visited MDM since 1966, the Appeals Council observed that "in September 1971, the manager of the Chemical Bank in New York City, stated that the claimant still signed accounts for Manhattan Direct Mail, Incorporated, and that through about December 1970 the claimant had come to the bank almost every day to transact official business." (12). Actually, the investigator's report of the telephone interview forming the basis for these conclusions was dated 9/16/71 and declared that the party interviewed had been the manager of the bank for 2 - 2 1/2 years, that "Mr. Miller is still the signer of the accts for Manhattan Direct Mail. There are about

4 or 5 accts. During the first year, Mr. Coco [the bank manager] stated, Mr. Miller used to come in almost every day to transact official business. During the past 8 or 9 months, however, he has been in only once or twice. * * * Although Mr. Coco has no knowledge of Mr. Miller's activities in the business, he would state that based on his business knowledge, W/E [the wage earner] is probably retired." (252). There was no indication of whether or not Miller actually signed "accounts" or was merely authorized to do so; nor was there any indication of the nature and extent of the "official business" allegedly transacted by Miller or of whether or not it required normal auditory ability on his part.

The Appeals Council also relied upon a report by one of its investigators that in September 1971 he had telephoned MDM and was told by Miller's wife, Marie Evers Miller, that he was not in the office that day but had been there all day the day before (12, 250). Here again, there was no indication of what Miller was allegedly doing on that day and of how much time he had spent at MDM's premises during that month or, for that matter, during the entire period commencing in June 1966.

The Appeals Council concluded that Miller's contention that he retired in June 1966 was not supported by

the evidence and that he had knowingly arranged his wage and bonus payments so as to evade deductions against his social security benefits, that his services from June 1966 through December 1971 did not differ from those previously performed; and that the retirement benefits received by him were erroneously paid and should be recovered (13-15).

The District Court added that when Miller applied for medical benefits on March 31st, 1966 he stated that he was employed as a consultant (although there was no elaboration of this characterization) and that when he applied for retirement benefits on June 1st, 1966, he stated that for the period January 1, 1966 to the date of filing the application his earnings totaled \$2,600 and that he expected to earn \$4,125 for the year 1966 (Opinion of the District Court, 1-2). Actually, the last-mentioned application admitted that his earnings in employment or self-employment had exceeded the maximum statutory amounts prior to the date of his retirement (218, Question 16(b) but went on to indicate a negative answer to the question "Do you expect to earn more than the monthly limit in employment or render substantial services in self-employment in each of the next three months?" and to list such months in which he did not expect such earnings (218, Questions 17(a) and (b)). Moreover, the annual report of his earn-

ings for the year 1966 indicates that his earnings from MDM after his retirement were not \$4,125 and were within the maximum statutory limits, and that the same was true respecting the subsequent years through 1971 (325).

Noting that there was no dispute respecting the hearing impairment suffered by Miller, the District Court nevertheless went on to hold that the Secretary's denial of benefits must be sustained because it was supposedly supported by substantial evidence, viz., the above discussed evidence, the District Court adding that "The claimant has the burden of establishing eligibility for benefits by convincing evidence. Carlson v. Richardson, 331 F. Supp. 1000, 1001 (D. Conn. 1971); 42 U.S.C. §403(b)(4)(A)(B). The Secretary found that decedent's hearing loss, and lessened activity at the plant was insufficient proof in the face of continued management control and payment for the services rendered in the form of bonuses." (Opinion of District Court, 6-7).

The Pertinent Statutory and Regulatory
Provisions

As previously indicated, Miller, as president of MDM, and as one of its directors and stockholders together with his wife and stepson, may be deemed to have been self-employed or within the employ of MDM.

The pertinent statutory and regulatory provisions respecting social security retirement benefits for such a claimant between 65 and 72 years of age emphasize the importance of the claimant's "earnings" for work actually performed by him.

42 U.S.C. §403(f)(5) defines an individual's earnings for a taxable year as the sum of his wages for services rendered in such year and his net earnings from self-employment, minus net loss from self-employment.

"Wages" are defined as any remuneration paid for employment. 42 U.S.C. §409.

The maximum earnings allowed by law without entailing a reduction of retirement benefits were \$125 per month for the period ending December 31, 1967. The maximum allowance was increased to \$140 per month beginning January 1, 1968. 42 U.S.C. §403(f).

Since the particular months when moneys have been earned are important in determining a claimant's right to benefits, it should be noted that a presumption of

law arises in that respect provided there be a demonstration that services were actually rendered in the months in question. Thus, if sums in excess of the foregoing maximum allowable compensation are paid to a claimant and it be shown that the payments were "earnings", i.e., that they were paid for services rendered by him during the taxable year in question, then a presumption of law arises that such compensation was earned by him in each month of the taxable year so as to permit a corresponding reduction of benefits in each such month. As the matter is summed up by the U.S. Department of Health, Education and Welfare's Social Security Handbook, 4th ed., published in February 1969, at pp. 296-297:

"WHEN THE WAGES WERE EARNED is the important factor for the annual earnings test [whereby all of a claimant's earnings for the year in question are considered in determining whether or not there will be a loss in benefits] as it applies to any employee. It does not matter when they are paid.

"When a beneficiary's earnings exceed \$1,680 for a 12-month taxable year (or \$140 times the number of months in a taxable year of less than 12 months [the said \$140 per month being the maximum allowable statutory amount as of the date of publication of the said Social Security Handbook]), he is presumed by law to have earned over \$140 from employment and to have performed substantial services in self-employment in each month in his taxable year. Of course, if he did not actually earn over \$140 from employment and did not perform substantial services in self-employment in each of the months in the taxable year, he should inform the Social Security Administration so that he will not lose part or all of his benefits for those months." (The last-indicated emphasis being supplied.)

This summary emphasizes the relevant aspects of the rather lengthy and perhaps obscure provisions of 42 U.S.C. §403, pertinent portions of which declare:

"Reduction of insurance benefits - Maximum benefits

"(a) Whenever the total of monthly benefits to which individuals are entitled under sections 402 and 423 of this title for a month on the basis of wages and self-employment income of an insured individual is greater than [the maximum statutory allowance] * * * such total of benefits shall be reduced to such amount; * * *

* * *

"Deductions on account of work

"(b) Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, and from any payment or payments to which any other persons are entitled on the basis of such individual's wages and self-employment income, until the total of such deductions equals -

"(1) such individual's benefit or benefits under section 402 of this title for any month, and

"(2) if such individual was entitled to old-age insurance benefits under section 402(a) of this title for such month, the benefit or benefits of all other persons for such month under section 402 of this title based on such individual's wages and self-employment income,

if for such month he is charged with excess earnings, under the provisions of subsection (f) of this section, equal to the total of benefits referred to in clauses (1) and (2).

* * *

"Months to which earnings are charged

"(f) For purposes of subsection (b) of this section-

"(1) The amount of an individual's excess earnings * * * shall be charged to months as follows:

There shall be charged to the first month of such taxable year an amount of his excess earnings equal to the sum of the payments to which he * * * [is] entitled for such month under section 402 of this title on the basis of his wages and self-employment income * * *, and the balance, if any, of such excess earnings shall be charged to each succeeding month in such year to the extent, in the case of each such month, of the sum of the payments to which such individual * * * [is] entitled for such month under section 402 of this title on the basis of his wages and self-employment income, until the total of such excess has been so charged. * * * Notwithstanding the previous provisions of this paragraph * * *, no part of the excess earnings of an individual shall be charged to any month * * * (E) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (5) of this subsection) of more than \$200 or the exempt amount as determined under paragraph (8)[involving increased benefits].

* * *

"(4) For purposes of clause (E) of paragraph (1)-

"(A) An individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing * * * his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

"(B) An individual will be presumed, with respect to any month, to have rendered services for wages (determined as provided in paragraph (5) of this subsection) of more than \$200 or the exempt amount as determined under paragraph (8) until it is shown to the satisfaction of the Secretary that such individual did not render such services in such month for more than such amount.

"(5)(A) An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year. * * *"

Insofar as concerns the "substantial services" referred to in 42 U.S.C. §403(f)(4)(A), supra, the following regulations set forth in Title 20 C.F.R. should be noted:

"§404.446 Definition of 'substantial services.'"

"(a) General. In general, the substantial services test is one of whether, in view of all the services rendered by the individual and the surrounding circumstances, the individual can reasonably be considered retired in the month in question. Even though an individual performs some services in a trade or business in a month, such services are not substantial where the evidence establishes to the satisfaction of the Administration that the individual may reasonably be considered retired in that month. In determining whether an individual has or has not performed substantial services in any month, the following factors are considered:

"(1) The amount of time the individual devoted to all trades and businesses;

"(2) The nature of the services rendered by the individual;

"(3) The extent and nature of the activity performed by the individual before he allegedly retired as compared with that performed thereafter;

"(4) The presence or absence of an adequately qualified paid manager, partner, or family member who manages the business;

"(5) The type of business establishment involved;

"(6) The amount of capital invested in the trade or business; and

"(7) The seasonal nature of the trade or business.

* * *

"(c) Evidentiary requirements. An individual who alleges that he did not render substantial services in any month, or months, shall submit detailed information about the operation of the trades or

businesses, including the individual's activities in connection therewith. * * *.

"§404.447 Evaluation of factors involved in sub-services test.

"In determining whether an individual's services are substantial, consideration is given to the following factors:

"(a) Amount of time devoted to trades or businesses. Consideration is first given to the amount of time the self-employed individual devoted to all trades or businesses, the net income or loss of which is includable in computing his earnings as defined in §404.429. For the purposes of this paragraph, the time devoted to a trade or business includes all the time spent by the individual in any activity, whether physical or mental, at the place of business or elsewhere in furtherance of such trade or business. This includes the time spent in advising and planning the operation of the business, making business contacts, attending meetings, and preparing and maintaining the facilities and records of the business. All time spent at the place of business which cannot reasonably be considered unrelated to business activities is considered time devoted to the trade or business. In considering the weight to be given to the time devoted to trades or businesses the following rules are applied:

"(1) Forty-five hours or less in a month devoted to trade or business. Where the individual establishes that the time devoted to his trades and businesses during a calendar month was not more than 45 hours, the individual's services in that month are not considered substantial unless other factors (see paragraphs (b), (c), and (d) of this section), make such a finding unreasonable. For example, an individual who worked only 15 hours in a month might nevertheless be found to have rendered substantial services if he was managing a sizable business or engaging in a highly skilled operation. However, the services of less than 45 hours rendered in all trades and businesses during a calendar month are not substantial.

"(2) More than 45 hours in a month devoted to trades and businesses. Where an individual devotes more than 45 hours to all trades and businesses during a calendar month, it will be found that the individual's services are substantial unless it is established that the individual could reasonably be considered retired in the month and, therefore, that such services were not, in fact, substantial.

"(b) Nature of services rendered. Consideration is also given to the nature of the services rendered by the individual in any case where a finding that the individual was retired would be unreasonable if based on time alone (see paragraph (a) of this section). The more highly skilled and valuable his services in self-employment are, the more likely the individual rendering such services could not reasonably be considered retired. The performance of services regularly also tends to show that the individual has not retired. Services are considered in relation to the technical and management needs of the business in which they are rendered. Thus, skilled services of a managerial or technical nature may be so important to the conduct of a sizable business that such services would be substantial even though the time required to render the services is considerably less than 45 hours.

"(c) Comparison of services rendered before and after retirement. Where consideration of the amount of time devoted to a trade or business (see paragraph (a) of this section) and the nature of services rendered (see paragraph (b) of this section) is not sufficient to establish whether an individual's services were substantial, consideration is given to the extent and nature of the services rendered by the individual before his "retirement," as compared with the services performed during the period in question. A significant reduction in the amount or importance of services rendered in the business tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired.

"(d) Setting in which services performed. Where consideration of the factors described in paragraphs (a), (b), and (c) of this section is not sufficient to establish that an individual's services in self-employment were or were not substantial, all other factors are considered. The presence or absence of a capable manager, the kind and size of the business, the amount of capital invested and whether the business is seasonal, as well as any other pertinent factors, are considered in determining whether the individual's services are such that he can reasonably be considered retired."

In discussing these criteria, the above mentioned Social Security Handbook, also states at pp. 297-298:

"WHETHER A SELF-EMPLOYED BENEFICIARY IS PERFORMING 'SUBSTANTIAL SERVICES' is determined by the actual services he performed in a month.

* * *

"The amount of earnings is not controlling in determining whether a self-employed person performed substantial services in a month. High earnings do not necessarily mean that substantial services were performed, nor do low or no earnings mean that they were not performed. * * *."

Summary of Argument

The gist of appellant's argument is that Miller sustained his burden of establishing his right to retirement benefits in accordance with the governing statutory and regulatory criteria, by adducing evidence of his auditory disability existing on June 1, 1966 and thereafter together with other evidence of his retirement on that date and for the subsequent period through December 1971.

As to the supposed evidence in the record relied upon by the Secretary in denying Miller's right to retirement benefits, such evidence is not substantial in that it is inconclusive and fails to take such criteria into account.

Consequently, it was error to deny Miller the right to the benefits sought.

POINT I

MILLER CLEARLY ESTABLISHED HIS
PRIMA FACIE RIGHT TO RETIREMENT
BENEFITS

As indicated previously, the evidence adduced on Miller's behalf was to the effect that he had consumed large quantities of quinine over a prolonged period of time; that such consumption was capable of producing deafness; that he incurred "an 80% hearing loss in the right ear and a 100% hearing loss in the left ear [and] There is an 83% binaural hearing loss"; "that this degree of hearing loss has definitely been present from at least 1968, as document[ed] by an audiogram done at Beltone Hearing Aid of Staten Island [and] In all probability it has been present from 1965 when the first hearing aid was purchased"; that he "has a severe handicap due to his hearing loss" contributed to by the "prolonged use of Quinine"; that he "can understand only shouted or amplified speech"; "[h]is use of the telephone is severely restricted [and] There are limitations to the amount of hearing aid amplification that can be used because of poor tolerance of amplified sound." (See p. 8, supra.) This data as to Miller's disability constitutes expert medical evidence based upon a medical examination performed at the time of the administrative proceedings below and upon scrutiny of Miller's medical history by

the physician who performed the examination (447-448).

Moreover, the evidence showed that prior to June 1, 1966, Miller performed a variety of work at MDM which required normal auditory ability. He operated the folding machine, in the course of which operation he had to have the ability to hear in order to avoid the risk of injury. He made truck deliveries, in connection with which it was necessary that he hear and converse with persons charged with shipment and receipt of the goods in question, and also that he hear in the usual way required in the operation of a truck. He also had to be able to hear in order to converse with others, either directly or by telephone, regarding information concerning his keeping of time and production schedules and job times, rendering advice as to salaries and employment and company policy, and the purchase and selection of equipment. Moreover, the evidence showed that prior to June 1, 1966, the performance of such work required Miller's presence at MDM, or making truck deliveries on its behalf, for 8 or 9 hours a day throughout the entire week. (See pp. 6-7, supra.)

The above mentioned period of disability, as found by the examining physician, included the period from June 1, 1966 through December 1971 - although the medical report speaks with greater certainty respecting the existence of the disability as of the beginning

of 1968, thereby justifying at least to this extent, the finding of the Administrative Law Judge that Miller retired as of the last mentioned date and was entitled to retirement benefits thereafter. It is submitted, however, that Miller established the fact of his retirement not only from the beginning of 1968 but from the earlier date of June 1, 1966 and continuing thereafter through December 1971 - by reason of the medical report indicating the existence of his deafness as of June 1, 1966 and the evidence that he retired on that date by reason thereof. This conclusion is further supported by the corroboration of such retirement by the evidence of the need for his presence at home in order to insure the safety of his stepson's children, and the total absence of any evidence contradicting the existence of Miller's disability from June 1, 1966 through December 1971.

It is no rebuttal for the Appeals Council to conclude, on the basis of the transcript of Miller's testimony, that he could hear well enough to testify in the administrative proceedings. No member of the Appeals Council was present on that occasion; no such member had an opportunity to observe Miller and whether or not the questions had to be shouted or electronically amplified so as to elicit his testimony; and no such member had an opportunity to note whether or not Miller had a "poor

tolerance of amplified sound", as indicated in the medical report of his disability, or to observe whether he suffered from the pain and discomfort which accompanies such a poor tolerance.

Indeed, as a matter of law, such a conclusion by the Appeals Council may not be adopted by the Secretary as a substitute for the expert opinion of the physician based on a medical examination of Miller and contained in the medical report of his disability. As declared in Collins v. Richardson, D.C., Tenn., 1972, 356 F. Supp. 1370, 1372, where a woman-claimant sought to establish her right to social security benefits by reason of the existence of a disability:

"Since the Social Security Act requires that the disability of a plaintiff result from a medically determinable physical or mental impairment, the plaintiff has no way of establishing her claim if her credible medical evidence is disregarded by the administrator. While the defendant Secretary has expertise in respect of some matters, he does not supplant the medical expert. McLaughlin v. Celebrezze, D.C. Tenn. (1965), 239 F. Suppl. 802, 804. The administrative findings of the defendant Secretary * * * which are not supported by substantial evidence, will not be permitted to stand. Ibid., 239 F. Supp. at 803." (Emphasis supplied.)

In the instant case, the only way Miller could establish his deafness and the consequent impairment of his ability to perform his ability to perform work, was by medical evidence of the kind adduced and therefore, as in Collins, supra, it was not available to the Secretary to supplant such evidence by the casual, unfounded

conclusion of the Appeals Council concerning Miller's auditory ability.

Nor may the Secretary better his position by admitting, as he now does, that Miller's disability was in fact incurred by him. Whether by such admission or by the uncontradicted evidence of the existence of Miller's disability as of June 1, 1966 through December 1971, it necessarily follows that his condition interefered with and substantially prevented him from performing his previous work so as to compel his retirement. Hence, Miller more than established his prima facie right to retirement benefits as sought by him, and therefore that right should be upheld where, as here, the record contains no substantial evidence on which the denial of his claim can be based. Davis v. Celebrezze, D.C., Tex., 1963, 213 F. Supp. 477; Sanders v. Celebrezze, D.C., Minn., 1963, 225 F. Supp. 836, 841.

POINT II

THE EVIDENCE RELIED UPON BY THE
SECRETARY IN DENYING MILLER'S RIGHT
TO RETIREMENT BENEFITS IS NOT SUB-
STANTIAL IN THAT IT IS INCONCLUSIVE
AND FAILS TO TAKE ACCOUNT OF THE GOV-
ERNING STATUTORY AND REGULATORY
CRITERIA

The Inconclusive Nature Of The Evidence
Relied Upon By The Secretary

Miller, as president, a director and stockholder in the family-owned corporation, MDM, should be deemed to have been self-employed and, as such, his right to retirement benefits does not depend upon whether or not he performed any services as such or any services over and above those covered by his compensation in the maximum amounts allowable by statute (\$125 per month from June 1, 1966 through 1967 and \$140 per month from January 1, 1968 through December 1971). Rather, his right to such benefits depends upon whether or not in each month of such period he performed "substantial services" as contemplated by the pertinent statutory and regulatory criteria so as to warrant a reduction or denial of that right.

In concluding that Miller should be denied the right to benefits, the Secretary relied heavily upon the fact that during the period from June 1, 1966 through December 1971, Miller continued to be the president and

a stockholder of MDM, and that its tax returns for the years in question indicated that he devoted "full" time to its business (see p. 13, supra). Such evidence, however, has been held to be unsubstantial and therefore insufficient to warrant a denial of retirement benefits. In Sewell v. Celebrezze, 216 F. Supp. 192, where, as here, the claimant continued to be the president and major shareholder of a close, family-owned corporation, and where the corporation's tax returns indicated that during the period for which he sought retirement benefits he devoted "100% of his time to the business", it was held that such evidence was not conclusive on the issue of whether or not he performed "substantial services" for the corporation so as to support a denial of his retirement benefits. This holding was reached despite his admitted receipt of a salary not exceeding the maximum monthly statutory allowances, and undistributed profits and other sums exceeding such allowances, and his testimony that he intended to devote 25 hours a week to the business and had reduced his activities to two or three hours a day. As stated by the Court in discussing the inconclusive nature of the foregoing entry on the corporate tax return that "100% of his time [was devoted] to the business" and in holding that such an entry, as well as other findings constituted an insufficient basis

for a denial of benefits:

"Equally vague is the 'Percentage of Time Devoted to Business (a) 100". It could mean a 48 hour week, 40 hours, something less or 100% of the time decided on for the corporation." Sewell v. Celebrezze, supra, 216 F. Supp. at p. 194).

The Court went on to hold that this evidence was insufficient, especially when viewed in the light of the claimant's testimony that he worked irregularly for either 25 hours a week or "possibly * * * 2 hours a day" and the further fact that he had surrendered control of operation and management of the corporation to other members of his family and planned to be elsewhere. (Sewell v. Celebrezze, supra, 216 F. Supp. at p. 196).

In the instant case, the identical situation prevails. Here, as in Sewell, the claimant, Miller, was the corporate president and a stockholder, and the corporation was family owned and controlled. So, also, the corporate tax returns indicated substantially identical information to that set forth in Sewell, viz., that the claimant devoted "full" time to the business of the corporation. Here also, it was testified that during the claimant's retirement he rendered services irregularly and for "10 or 12 hours a month" (105). The evidence here also showed that after Miller's retirement beginning June 1, 1966, the management and operation of the business had been turned over and continued by his wife and stepson (138-139) and that Miller

had been paid the maximum monthly statutory allowances plus undistributed profits or other sums which were not received as compensation for services rendered (131). Finally, as in Sewell, the instant claimant on the occasion of his retirement had made other plans in that he intended to devote his time primarily to the care and supervision of his stepson's children.

In short, the decision in Sewell clearly prompts a determination that the finding of Miller's nominal role as president, director and shareholder of MDM, as well as the entries on its corporate tax returns to the effect that he devoted "full" time to its business, is inconclusive and is therefore no evidence sufficient to support the Secretary's denial of retirement benefits.

The Secretary also relied upon the conclusory statement by the Appeals Council regarding Miller's auditory disability (cited at pp. 13-13, supra) that: "Perhaps it does hamper his operation of printing equipment and his use of the telephone, but it would have no effect on his ability to do paperwork and to give advice and consultation which have been his main functions in the Corporation." (Emphasis supplied.) Such a gratuitous conclusion as to the nature of Miller's "main functions" not only fails to take into account much of the evidence in the record but also overlooks the fact

that even those portions of his work thus characterized as his "main functions" required the ability to hear and converse with others.

The evidence in the record indicates that prior to June 1, 1966, Miller's work at MDM consisted of making truck deliveries, running the folding machine, doing executive work (88-89), signing checks, advising as to corporate policies, salaries and employment, making and discussing the purchase of equipment, selecting additional plant space when needed, making management decisions (119-120), keeping production schedules, estimating job times, keeping time schedules and records (170-171). In all of this work, it was necessary that he be able to hear (120, 171-172). The operation of a truck in New York City, as well as the need to converse with persons charged with shipping and receiving deliveries by way of such a truck, requires such ability. The evidence indicated that the safe operation of the folding machine also required the ability to hear (150-164). The discussion of his executive work, the matters warranting the signing of checks, the facts relating to corporate policies, salaries, employment, purchases of equipment, additional plant space, production schedules and other records, all required the ability to hear such discussion and the answers to inquiries needed in connection with such work. For the Appeals Council simply to select

his "paperwork", advice and consultation, and characterize them as his "main functions" and as not requiring the ability to hear, clearly ignores the foregoing evidence of his other functions and the need to hear and discuss the matters which were the subject of his "paperwork", advice and consultation.

It will also be seen that Miller's receipt of "bonuses" at the end of the years 1968 through 1971, whether considered alone or in combination with the other findings of the Secretary, provides no basis for the denial of retirement benefits. As noted hereinabove at pp. 18-19, the important consideration in determining a claimant's right to such benefits is whether or not for work performed in particular months he received "earnings", such as "wages", in excess of the maximum statutory allowances; and although such "earnings" may be deemed to have been constructively paid so as to be credited to a particular period and thereby form the basis for a denial of benefits, before this can be done it is essential that the payment in question be shown to be "earnings" or "wages". In other words, retirement benefits may be reduced by reason of alleged "excess earnings" in the form of a lump-sum payment in any particular year, providing it be shown that the payment was made for services rendered by the claimant in a particular month or months and that such services exceeded those covered by the maximum statutory allowances for such month or months.

It does not matter what the payment is called. As stated at page 298 of the Social Security Handbook, cited at page 19, supra:

"REGARDLESS OF WHAT THE INCOME IS CALLED OR WHO RECEIVES IT, if it is actually wages for services performed by a beneficiary or net earnings from self-employment derived by him, it must be included in applying the annual earnings test [whereby benefits may be reduced if earnings exceed the maximum statutory allowance.]"

Neither is there any presumption that any particular payment is in the nature of "earnings" for services rendered in any month or months. As noted at pages 18-19, supra, a presumption of law as to when a payment is "earned" may arise only where it is shown that services (or more accurately, services in excess of those covered by the maximum statutory allowances) were rendered in the months in question. Absent such a demonstration, there is no such presumption.

The record in the instant case indicates that the "bonuses" received by Miller were paid to him as undistributed profits of MDM and were in recognition or repayment of his capital contributions made during the years 1950 to 1957 (108-109, 131-134). There is absolutely no evidence in the record to support the Secretary's finding that the "bonuses" represented earnings by Miller or that he had knowingly arranged his wage and bonus payments so as to evade deductions against his social security benefits. In Sewell v. Celebrezzee, supra, 216 F. Supp. at

pp. 196-197, where the Secretary had made a similar finding respecting undistributed corporate profits and other sums paid to a claimant in 1959 and 1960 but where there was no substantial evidence that he had performed substantial services after his retirement, the denial of benefits was held to be improper, the Court declaring:

"Neither is there substantial evidence to sustain the finding, 'that the claimant continued * * * to receive substantial remuneration from the corporation during all of 1959 and 1960'., and 'Although some of the remuneration, in the form of undistributed corporate profits, may constitute a return on investment, the Appeals Council believes and so finds, that a substantial portion thereof was attributable to, and was intended as payment for, the services rendered by the claimant for the corporation'., and that he earned more than \$100 also in November and December 1959 and that deductions are impossible for those months'." (Emphasis supplied.)

The Court also rejected the contention that the claimant had arranged to reduce his monthly salary during his retirement so that it would not exceed the maximum statutory allowance, it being observed at page 197 of the report:

"The finding that the reduction in salary to \$100 was 'arbitrarily established' by the plaintiff, under the record in its entirety, can not be held to be more than an expression of his motive for the arrangement or a part of his explanation of his plans to qualify under the Act, which absent any element of fraud or deceit may not be inquired into or questioned. MacPherson v. Ewing, D.C. Cal., 107 F. Supp. 666 (1952)."

So, also, in Gardner v. Hall, 366 F. 2d 132, it was held that undistributed corporate profits should not be

construed as "wages" for Social Security purposes; and in Ford v. Ribicoff, 199 F. Supp. 822, 826, where a retired corporate director and Vice-President, suffering from impaired vision but visiting the office of the corporation at his own pleasure and assisting in minor matters so as to keep his mind occupied, was paid \$100 per month salary and \$150 per month retirement pay, it was held that if the entire amount had been designated retirement pay, no question would have arisen as to his retired status.

Thus, the instant case falls squarely within the principles enunciated by the foregoing authorities whereby the "bonus" payments received by Miller may not be deemed "earnings" or "wages" in the years in question. The only evidence in the record is that the "bonuses" did not represent compensation for services rendered by him during the years in question, and the limitation of his salary so as not to exceed the maximum statutory allowances, may not properly be characterized by the Secretary as an attempt to evade deductions from retirement benefits and then used as a basis for imposing such deductions.

Equally inconclusive are the remaining findings relied upon in denying benefits to Miller. The statement made on September 16, 1971 by the bank manager, Cocco, that Miller "is still the signer of the accts for Manhattan Direct Mail" and that "During the first year [i.e., during 1969

or 1970, which was the earliest period when Coco was employed as bank manager] Miller 'used to come in almost every day to transact official business'" does not constitute conclusive evidence that Miller performed substantial services during those years or during any part of the period from June 1, 1966 through December 1971. The statement does not indicate whether Miller actually signed "accounts" or checks or, was merely authorized to do so pursuant to the corporate by-laws whereby any two of its officers were so authorized (121). Nor is there any indication of the all-important factors of the amount of time consumed and the specific nature of the alleged "official business" transacted by Miller at the bank. Indeed, the weight to be attached to the bank manager's statement is at least doubtful in view of his comment that he "has no knowledge of Mr. Miller's activities in the business" and his remark that "based on his business knowledge W/E [i.e., the wage earner, Miller] is probably retired." (252). And the inconclusive nature of the statement is further emphasized by the statement of one of MDM's employees, Josephine Nehrins, that during the same period referred to by the bank manager, Miller "has not done any work for the firm" (246).

A similar inconclusiveness characterizes the report by the investigator in September 1971 that Miller had been

present at MDM's office throughout one day in that month. (See p. 15, supra.) Such a finding completely ignores the requirement that there be a demonstration that services were actually rendered to an extent whereby a denial of benefits is warranted. Throughout the administrative proceedings below, Miller contended, and the evidence showed, that he performed some services at MDM's office, albeit on an irregular basis. It is no answer for the Secretary to point, without more, to a report confirming Miller's presence at MDM's office on one occasion. Obviously, such a finding is inconclusive as to whether or not he rendered services on behalf of MDM from June 1, 1966 through December 1971, the nature and extent of such services, and how much time he spent during each month of such period in rendering them. Moreover, especially in the case of a man such as Miller, whose entire preceding life had been one involving great activity and who would be expected to chafe at the comparatively sedentary role of caring for his stepson's children at home, it will be seen that the investigator's report is conspicuously deficient in setting forth any indication of whether or not Miller was at the office on the day in question in order to render substantial services or merely as a visitor for nostalgic purposes or to engage in some unsubstantial activity.

Finally, it will be seen that the additional evidence noted by the District Court (and referred to at pp. 16-17,

supra, is also unsubstantial. Miller's characterization of his employment as a "consultant", in his application for medical benefits prior to his retirement on June 1, 1966, is far from conclusive as to all of his activities as such, or as to the specific nature of the activities comprehended by that term, or to what extent he pursued such activities before or after the period of his retirement. The entries in his application for retirement benefits are also, at most, equivocal insofar as they purport to set forth his earnings for the full year 1966 and are contradicted in the same document and by the subsequent annual earnings report. Moreover, they are not a substitute for a demonstration on the part of the Secretary that Miller actually had "excess earnings" and actually rendered services for MDM giving rise thereto during all or any part of the period of his retirement.

In short, the foregoing supposed evidence, which constitutes all or the bulk of the evidence relied upon by the Secretary in denying the benefits claimed by Miller, is fatally inconclusive and does not warrant the conclusion that there was substantial evidence in the record to support the Secretary's position.

The Failure To Take Account Of The Govern-
ing Statutory and Regulatory
Criteria

The inconclusive, and hence unsubstantial, nature of the evidence relied upon in denying the benefits claimed,

is further emphasized by the Secretary's failure to consider the governing statutes and regulations in situations of the instant kind. The pertinent statutory provisions are to the effect that where a self-employed claimant has been shown to have received "excess earnings", i.e., compensation for services rendered during a particular taxable year, he shall be presumed to have rendered "substantial services" in each month of such year "until it is shown to the satisfaction of the Secretary that such individual rendered no such substantial services in such month with respect to any trade or business [involved]." See pp. 19-22, supra, and 42 U.S.C. §403(f)(4)(A) at p. 21, supra. Plaintiff does not concede that Miller received any such excess earnings during the year in question. Assuming arguendo, however, that there be an issue respecting the rendition of substantial services by Miller during those years, it will be seen that 20 C.F.R. §§404.446 and 404.447 define "substantial services" in terms of specific criteria. See pp. 22-25, supra.

However, despite the promulgation of these criteria by the Secretary, he has departed from them in the instant case. The evidence relied upon by the Secretary does not indicate the specific amount of time allegedly devoted by Miller to MDM, whether it was more or less than 45 hours a month during the period from

June 1, 1966 through December 1971; the nature of the services allegedly rendered by him during that period; nor a comparison of the services rendered by him before or after the commencement thereof (see 20 C.F.R. §404.447, supra, at pp. 23-24) - although the record indicates that Miller adduced evidence on all of these points to support his claim (see, for example, 86, 88, 105-106, 117-121). Neither does it appear that the Secretary attached any importance to the presence of Miller's wife and stepson as qualified paid managers of MDM and as having assumed his functions after his retirement, nor to the limited size of its business (thereby making plausible the otherwise unlikely inference that Miller's occasional checking of the records of MDM after his retirement, or his comments thereon at home, were sizable activities of the same order of magnitude as those performed by him before he retired).

Thus, in determining whether or not Miller rendered "substantial services" to MDM during the period of his retirement, the Secretary departed from the very rules which he promulgated for resolving such questions, and substituted in their place the above discussed inconclusive evidence.

It is therefore clear that such an approach provided a totally inadequate basis for denying the benefits sought. Inconclusive evidence is unsubstantial evidence and hence,

is no evidence of the kind required by law in a situation of the instant kind, and may not support the Secretary's determination or the District Court's judgment in affirmance thereof.

POINT III

THE SECRETARY FAILED TO SUSTAIN HIS BURDEN OF GOING AHEAD WITH THE PROOF

Once Miller established the existence of a disability that interfered with or prevented the performance of his work, the burden shifted to the Secretary to go forward with the proof and demonstrate that Miller had no right to benefits, as is the situation in regard to cases falling under disability benefit provisions of the Social Security Act in pari materia with the provisions here involved. Lackey v. Celebrezze, 349 F. 2d 76; Randall v. Celebrezze, 239 F. Supp. 728; Woods v. Celebrezze; 228 F. Supp. 429; Knelly v. Celebrezze, 249 F. Supp. 521.

The rule as to the shifting of the burden is of general application. As indicated in 21 N.Y. Jurisprudence at pp. 289-290, after pointing out that the burden of establishing the truth of a given proposition of fact essential to a cause of action or defense rests in a strict sense upon the party who has the affirmative of the issue and who must be prepared to establish his position by a preponderance of the evi-

dence:

"The burden of proof in the secondary sense of going forward with the evidence rests upon the party who at the particular stage of the trial is required to meet a prima facie case established by his adversary. The burden of proof in this sense is not necessarily fixed on the same party throughout the trial, but may shift from party to party as the evidence is developed."

See, also, the language of 42 U.S.C. Sec. 403 (f) (4) (A), supra, at page 21, where it is indicated that in the event that excess earnings exist, a claimant is presumed, with respect to any month to have been self-employed therein "until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month"; emphasis supplied.

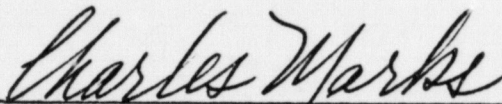
In the instant case, Miller, by demonstrating the existence of his disability as of June 1, 1966 and through December 1971, and its consequent interference with the performance of his work, established prima facie proof of his resulting retirement. It then became incumbent upon the Secretary to go forward with the proof and demonstrate that notwithstanding Miller's disability, he did not actually retire but continued to earn compensation in an amount disqualifying him from retirement benefits. This, the Secretary has conspicuously failed to do by any evidence recognized by law. Hence, the posture of this case is that despite the inordinate period of time consumed by the proceedings

to date during which Miller has died, there remains absolutely no reason for the Secretary to withhold any of the benefits sought.

C O N C L U S I O N

The judgment of the District Court should be reversed so as to award summary judgment to plaintiff for all of the benefits sought by Miller or, if this be deemed inappropriate, then at the very least, the judgment should be modified so as to award plaintiff the benefits for the period from January 1, 1968 through December 1971.

Dated: New York, N.Y.,
October 20, 1975.



CHARLES MARKS,
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Appellant

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